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In The

Supreme Court of the United States

HANNA STEEL CORP., *et al.*,

Petitioners,

v.

KATIE LOWERY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

LLOYD W. GATHINGS II
HONORA M. GATHINGS
Counsel of Record
GATHINGS LAW
2100 Third Avenue North, Suite 900
Birmingham, AL 35203
(205) 322-1201
Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the petition, where the Eleventh Circuit's Opinion affirming the district court merely maintains the circuit court's previous position regarding the burden of proof on removal and the evidence upon which removal jurisdiction must be determined. Petitioners are merely dissatisfied with the outcome, which is in accord with the other federal circuits which have considered these questions, and which was dictated largely by Petitioner's failure to include the necessary proof with its removal petition.

LIST OF PARTIES

Respondents are in agreement with the Petitioners' designation of the parties.

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INTRODUCTION

This petition is totally void of any compelling reason for this Court to exercise jurisdiction:

- The Eleventh Circuit's opinion added nothing to the alleged conflict between the federal circuits concerning the burden of proof on removal jurisdiction.
- The burden of proof applied by the Eleventh Circuit to determine diversity jurisdiction on removal is in accord with all federal circuits who have adopted a specific burden of proof.
- Although the Second Circuit labeled the standard adopted the "reasonable probability" test, the Court made it clear that it was applying a "preponderance of the evidence" standard to the jurisdictional evidence. There is no real difference in the practical effect of the differently labeled burden of proof applied by the Second Circuit with the preponderance of the evidence burden applied by the Third, Fifth, Sixth, Seventh, Eighth and Eleventh Circuits.
- The Eleventh Circuit's position that removal jurisdiction must be determined on the basis of the petition for removal and the documents attached to the petition is consistent with well-established removal procedure among the federal circuits.

Rather, this case involves Petitioners who are dissatisfied with the outcome, which is in accord with the federal circuit decisions which have considered these

questions, and which was dictated largely by Petitioners' failure to include the necessary proof with their removal petition. The questions upon which Petitioners seek a writ of certiorari involve proof of removal jurisdiction in general, as opposed to the specific removal provisions of the Class Action Fairness Act ("CAFA"), which does not speak to either of the questions raised by the Petitioners. The Petitioners repeatedly mischaracterize the statements and holdings of the Eleventh Circuit, wrongly arguing a "'clear' and 'unequivocal' evidence" standard not adopted or applied by the court below. (Pet. at 4). Without such mischaracterizations of the Eleventh Circuit's opinion, Petitioners know they cannot create a sensational result below or a square conflict between the circuits which they obviously feel is necessary for the petition to be granted.

STATEMENT OF THE CASE

1. As noted by the District Court, the determinative question before the district court in this mass action was whether Alabama Power met its burden to establish by a preponderance of the evidence that $75,000 was in controversy for individual plaintiffs or $5,000,000 in controversy for all plaintiffs. While considerable discovery was conducted in the case prior to removal from state court, Alabama Power cited nothing from the voluminous discovery to support its statement that the required jurisdictional amount was in controversy. (Pet. App. 6a, n. 8).

Instead, Alabama Power *after removal* proffered jury verdicts from two other toxic tort cases in Alabama in an attempt to prove the amount in controversy. *Id.* at 110a-111a. The cases were not closely similar to the present case and served as mere "anecdotal evidence" of the amount in controversy. *Id.*

The district court issued an order remanding the case to state court, finding that the removing defendants had not met their burden of proving by a preponderance of the evidence the amount in controversy. *Id.* at 114a.

2. The Eleventh Circuit Court of Appeals granted the defendants' petitions for discretionary review of the district court's remand order pursuant to the provisions of CAFA. 28 U.S.C. § 1453(c). The Court of Appeals affirmed, finding that the defendants had failed to prove by a preponderance of the evidence the requisite jurisdictional amount.

a. The petition wrongly asserts that the Eleventh Circuit held the removing defendants to a "'clear' and 'unequivocal' evidence" standard in establishing the amount in controversy.

(Pet. at 4). Rather, the Court correctly held that an "unambiguous *statement*," *not evidence* as the Petitioners contend, "that clearly establishes federal jurisdiction," must be contained in the petition for removal and supporting documents. (Pet. App. 67a, 79a). (Emphasis Added.) The unambiguous, clear statement is then tested by a "preponderance of the evidence" standard, which, if met by the removing

defendants, establishes the jurisdictional amount on removal. (Pet. App. 60a).

Similarly taken out of context by the Petitioners is the Court's statement concerning the documents and pleadings from the plaintiffs "unambiguously" establishing federal jurisdiction. Where the only documents are those of the plaintiffs, the situation to which the court referred, there is no competing evidence to be judged by a "preponderance of the evidence" standard. Either the pleadings and documents of the plaintiffs do or do not establish jurisdiction.

b. The "preponderance of the evidence" standard is the burden of proof applied on removal by every federal circuit court, with the possible exception of the Second Circuit, which has labeled its standard the "reasonable probability" test but has made clear that the evidentiary standard to be applied is by a "preponderance of the evidence." It is thus fairly clear that despite some difference in labeling of the test, the Second Circuit's standard reflects no real difference in application or effect than that of the other circuits who have adopted a standard. The Eleventh Circuit's decision herein has done nothing to enhance or widen any perceived split, but instead at most has preserved the status quo among the circuits addressing this question. Whether the Eleventh Circuit's decision "puts it at the strictest end of the continuum," as the Petitioners contend, it continues to keep the Eleventh Circuit in line with the other circuits that utilize the preponderance of the evidence for the burden of proof. (Pet. at 4). Further, Petitioners never

argued in the district court or the Eleventh Circuit that any evidentiary standard should be applied other than the "preponderance of the evidence" standard.

The Circuit Court's statement that the court must remand unless "the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them" when taken in context does not depart from the previous holding of the Eleventh Circuit or the well-established practice among the other circuits. The Court's statement was made in the context of a removal petition filed on the basis of pleadings alone which did not set forth the amount in controversy and to which the removing defendants did not attach any discovery, although it was available, or any other proof of the amount in controversy. Thus, *because the defendants did not put anything else before the court at the time of removal to establish the amount in controversy,* the amount in controversy would have to be evident or readily deducible from the pleadings, as pointed out by the Eleventh Circuit.

The Eleventh Circuit did not "candidly" acknowledge raising the burden of proof, as argued in the petition. (Pet. at 9). The Court merely observed that if the defendant can satisfy its burden under the bare pleadings context, when no other documents are submitted to establish the amount in controversy, then a higher burden would also be satisfied since the amount in controversy would be "stated clearly" or "readily deducible" from the face of the pleadings in

this context. (Pet. App. 61a). Thus, the Court did not raise the burden of proof. If the defendants had chosen to cite to the voluminous discovery in the case or to submit evidence of the amount in controversy with their petition for removal, their burden would have still been by a preponderance of the evidence. (Pet. App. 60a).

The Petitioners' assertion that the Eleventh Circuit's decision allows a plaintiff to "block a defendant's statutory right of removal simply by omitting a sum certain in the complaint" is totally false and unfounded. Indeed, the Eleventh Circuit noted that the removing defendants could have cited, although they did not, to discovery already conducted in the case. (Pet. App. 6a, n. 8). Further, as pointed out by the Eleventh Circuit, if the removing defendants had nothing to prove the amount in controversy, either from their own files, experts or from the plaintiffs, they could have waited for the case to later become removable pursuant to 28 U.S.C. § 1446(b) on the basis of "a copy of an amended pleading, motion or other paper." (Pet. App. 65a).

c. The Eleventh Circuit's prohibition on post-removal discovery to prove the amount in controversy where the removing defendant has cited no factual basis in its petition to support federal jurisdiction is not inconsistent with the well-established authority of the district court to engage "in conduct that is within its inherent power, but falls short of invoking formal discovery, such as questioning a plaintiff's

counsel in open court about the value of the plaintiff's claims." (Pet. App. 78a, n. 75).

3. The defendants filed a petition for rehearing which was denied. The Eleventh Circuit then stayed issuance of its mandate pending proceedings in this Court.

REASONS FOR DENYING THE PETITION

Petitioners have not carried their burden of demonstrating any compelling reasons for the petition to be granted. *See* Sup. Ct. R. 10. There is no indication that the outcome of this case would have been different if the case had been pending in any other circuit, including the Second Circuit. Petitioners never argued in the district court or the Eleventh Circuit that any evidentiary standard should be applied other than the "preponderance of the evidence" standard. The Eleventh Circuit continued to apply the same burden of proof that the court, along with the Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits, had adopted previously. Further, the Eleventh Circuit's determination that removal jurisdiction must be proved by the petition for removal and the documents attached to the petition is in accordance with the procedures followed by the other circuit courts of appeal. In short, the Eleventh Circuit's decision on the two questions raised by the

Petitioners did nothing other than maintain the status quo.[1]

I. The Eleventh Circuit applied the same burden of proof, the preponderance of the evidence, as previously adopted by the Eleventh Circuit and which is in accord with the other circuits which have adopted a standard.

In its 1996 decision in *Tapscott v. MS Dealer Serv. Corp.*, 77 F.3d 1353, 1356-57 (11th Cir. 1996), the Court adopted the "preponderance of the evidence" standard as the removing party's burden of proof for establishing the jurisdictional amount where damages are unspecified. (Pet. App. 55a). The Eleventh Circuit continued to utilize the "preponderance of the evidence" standard in the present case as the burden of proof for the removing party. (Pet. App. 60a). Petitioners admit this is the same burden of proof adopted by the Third, Fifth, Sixth, Seventh and Ninth Circuits. (Pet. at 12). It is also the same burden

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[1] Respondents agree that the mass action provisions of CAFA present important issues of federal law which would benefit from this Court's review. However, the questions raised by the Petitioners are general questions applicable to all cases removed on the basis of diversity of citizenship, as opposed to the specifics of CAFA. Review of the "quagmire" of the CAFA provisions is not sought by the Petitioners. Apparently they are content with the Eleventh Circuit's interpretation of CAFA, although they are not content with losing on well-established, general removal standards.

of proof applied by the Eighth Circuit Court of Appeals. *Toller v. Sagamore Ins. Co.,* 2008 U.S. Dist. LEXIS 27666, *citing, In re Minn. Mut. Life Ins. Co. Sales Practices Litig.,* 346 F.3d 830 (8th Cir. 2003).

While not specifically adopting the "preponderance of the evidence" as the burden of establishing jurisdiction on removal, the Tenth Circuit has pointed out that "courts generally require that a defendant establish the jurisdictional amount by a preponderance of the evidence where the plaintiff's damages are unspecified." *Martin v. Franklin Capital Corp.,* 251 F.3d 1284, 1290 (10th Cir. 2001). The Court went on to apply the preponderance of the evidence as the burden of proof. *Id.*

Petitioners contend there is a split between the Circuits regarding the burden of proof because the Second Circuit applies the "reasonable probability" test. However, although a different label may be put on the applicable test by the Second Circuit, that Court has made it clear that the evidentiary burden is really the "preponderance of the evidence" test. Noting that it must appear to a "reasonable probability" that the claim exceeds the statutory amount, the Second Circuit went on to clarify that "[w]here, as here, jurisdictional facts are challenged, the party asserting jurisdiction must support those facts with 'competent proof' and 'justify [its] allegations by *a preponderance of evidence.*'" *United Food & Commercial Workers Union, Local 919, AFL-CIO v. Centermark Properties Meriden Square, Inc.,* 30 F.3d 298, 305 (2d Cir. 1994), *quoting, McNutt v. General Motors*

Acceptance Corp., 298 U.S. 178, 189, 80 L. Ed. 1135, 56 S. Ct. 780 (1936).[2]

While Petitioners contend that determination of the burden of proof standard is "outcome determinative," those circuits who have adopted a standard, despite the labeling, have tested the jurisdictional evidence by the "preponderance of the evidence" standard. This includes the Eleventh Circuit and the Second Circuit.

The Eleventh Circuit stated below that "Defendants must establish the jurisdictional amount by a preponderance of the evidence." (Pet. App. 60a). Petitioners have attempted to circumvent this clear statement by mischaracterizing the Court's opinion and statements regarding the removal petition. For example, the petition wrongly asserts that the Eleventh Circuit held the removing defendants to a "'clear' and 'unequivocal' evidence" standard in establishing the amount in controversy. (Pet. at 4). Rather, the Court correctly held that an "unambiguous *statement,*" (*not "unambiguous evidence*" as the Petitioners contend), "that clearly establishes federal jurisdiction," must be contained in the petition for removal and supporting documents. (Pet. App. 67a, 79a). (Emphasis Added.) The unambiguous, clear statement is then tested by a "preponderance of the

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[2] The Fourth Circuit has not adopted a standard to be applied in all cases. *Brooks v. GAF Materials Corp.*, 532 F. Supp. 2d 779 (D.S.C. 2008).

evidence" standard, which, if met by the removing defendants, establishes the jurisdictional amount on removal. (Pet. App. 60a).

Similarly taken out of context by the Petitioners is the Court's statement concerning the documents and pleadings from the plaintiffs "unambiguously" establishing federal jurisdiction. Where the only documents are those of the plaintiffs, the situation to which the court referred, there is no competing evidence to be judged by a "preponderance of the evidence" standard. Either the pleadings and documents of the plaintiffs do or do not establish jurisdiction. Obviously, if the operative plaintiffs' complaint alleges the requisite jurisdictional amount, the document shows it "unambiguously" regardless of whether that is the burden of proof.

The Circuit Court's statement that the court must remand unless "the jurisdictional amount is either stated clearly on the face of the documents before the court, or readily deducible from them" when taken in context does not depart from the previous holding of the Eleventh Circuit or the well-established practice among the other circuits. The Court's statement was made in the context of a removal petition filed on the basis of pleadings alone which did not set forth the amount in controversy and to which the removing defendants did not attach any discovery, although it was available, or any other proof of the amount in controversy. Thus, *because the defendants did not put anything else before the court at the time of removal to establish the amount in*

controversy, the amount in controversy would have to be "clearly on the face of" or "readily deducible" from the pleadings, as pointed out by the Eleventh Circuit. Again, without proof having been submitted by the defendants with their removal petition, there was no evidence to weigh by the "preponderance of the evidence" standard.

The Eleventh Circuit did not "candidly" acknowledge raising the burden of proof, as argued in the petition. (Pet. at 9). The Court merely observed that if the defendant can satisfy its burden under the bare pleadings context, when no other documents are submitted to establish the amount in controversy, then a higher burden would also be satisfied since the amount in controversy would be "stated clearly" or "readily deducible" from the face of the pleadings in this context. (Pet. App. 61a). Because the facts would not only meet the present burden but would also satisfy a higher burden does not raise the burden. To suggest otherwise as the Petitioners have is erroneous legal reasoning. When a plaintiff at trial has an admission from the defendant driver does that raise his burden of proof above the usual burden to "reasonably satisfy" the jury? Of course not.

Thus, the Eleventh Circuit did not raise the burden of proof in this case just because certain facts might satisfy a higher burden. If the defendants had chosen to cite to the voluminous discovery in the case or to submit evidence of the amount in controversy with their petition for removal, their burden would

have still been by a preponderance of the evidence. (Pet. App. 60a).

The Petitioner's assertion that the Eleventh Circuit's decision allows a plaintiff to "block a defendant's statutory right of removal simply by omitting a sum certain in the complaint" (Pet. at 5) is totally false and unfounded. Indeed, the Eleventh Circuit noted that the removing defendants could have cited, although they did not, to discovery already conducted in the case. (Pet. App. 6a, n. 8). Further, as pointed out by the Eleventh Circuit, if the removing defendants had nothing to prove the amount in controversy, either from their own files, experts or from the plaintiffs, they could have waited for the case to later become removable pursuant to § 1446(b) on the basis of "a copy of an amended pleading, motion or other paper." (Pet. App. 65a).

II. The Eleventh Circuit's holding that removal jurisdiction must be determined by the petition for removal and the documents attached to the petition is consistent with well-established removal procedure among the federal circuits.

Petitioners protestations to the contrary, it is well-established that removal jurisdiction is determined by the record before the court *at the time the removal petition is filed* in federal court. WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3D § 3723, pp. 568-569. "This means that the federal district court must

attempt to determine the dimensions of the amount put in controversy by the plaintiff's cause of action from the complaint filed by the plaintiff in state court and any amendments thereto, the notice of removal filed with the federal court, and any other relevant materials in the state court record." *Id.* § 3725, pp. 73. *Accord, id.* at § 3721, pp. 319-321.

The Eleventh Circuit's holding in this case that removal jurisdiction cannot be established by discovery conducted after removal to federal court is in exact agreement with the well-established law that removal jurisdiction must be determined on the record in the state court at the time of removal. The decision below neither departs from nor adds to this precedent.

The Eleventh Circuit's opinion regarding jurisdictional discovery after removal is not inconsistent with this Court's precedent cited by Petitioners. The issue of whether discovery can be conducted by a removing defendant after removal in order to prove the jurisdictional amount was not raised or addressed by this Court in *Gibbs v. Buck,* 307 U.S. 66 (1939); *McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178 (1936); *Arbaugh v. Y & H Corp.,* 546 U.S. 500 (2006); *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340 (1978); *U.S. Catholic Conference v. Abortion Rights Mobilization,* 487 U.S. 72 (1988); *Martin v. Franklin Capital Corp.,* 546 U.S. 132, 126 S. Ct. 704 (2005). In fact, none of these cases were removal cases except *Martin*, where the only issue was whether a party should have been sanctioned for filing the removal

petition. Neither of these cases cited by the Petitioners specifically authorized jurisdictional discovery after removal and thus are not conflicted by the Eleventh Circuit's decision below. The Eleventh Circuit's decision applies only to diversity jurisdiction and the propriety of jurisdictional discovery after removal. (Pet. App. 73a, n. 71).

Petitioners also contend the Eleventh Circuit's decision conflicts with the Ninth Circuit's decision in *Abrego Abrego v. Dow Chem. Co.,* 443 F.3d 676 (9th Cir. 2006). While the Ninth Circuit did acknowledge that some district courts allow discovery regarding jurisdiction after removal, the Court went on to hold that discovery is not required and deferred to the district court's discretion not to allow discovery. Thus, had the same standards been applied herein, the result would have been the same – no discovery on jurisdictional issues after removal.

The Fifth Circuit's decision in *Smallwood v. Illinois Central Railroad Company,* 385 F.3d 568 (5th Cir. 2004) is not factually on point with the present case. The Fifth Circuit allowed a summary inquiry with limited discovery on a "tight judicial tether, sharply tailored to the question at hand," to determine whether an in-state defendant had been fraudulently joined in order to defeat diversity jurisdiction. Fraudulent joinder was not an issue in the court below and discovery with regard to that issue was not discussed or considered.

Finally, whether or not some district courts have allowed jurisdictional discovery under similar circumstances as presented by this case, "[a] conflict between a decision of a district court and that of a court of appeals is generally not sufficient ground to grant the writ . . . " 23 MOORE'S FEDERAL PRACTICE, § 510.21[1] (Matthew Bender 3d ed.)

III. The issues raised by the petition, far more perceived than real, do not present important questions of federal law.

The final section of the petition lays one mischaracterization after another, after another, after another, in an attempt to lay the foundation for a writ of certiorari. The issues raised must be real before they can rise to a level of importance in the judicial system. As is abundantly clear from the previous sections, the Eleventh Circuit did not depart from the "preponderance of the evidence" standard – the same standard which has been adopted by every federal circuit that has adopted a standard for the removing party's burden of proof.[3]

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[3] In order to avoid another distraction from the "reasonable probability" label used by the Second Circuit, the Court is reminded that the Second Circuit made it very clear in *United Food & Commercial Workers Union, supra,* that the "reasonable probability" test and the "preponderance of the evidence" test are one and the same in the Second Circuit.

The First Circuit has also noted that the "preponderance of evidence" standard, articulated both as "more likely than not"

(Continued on following page)

Further, the Eleventh Circuit's view of the propriety of discovery on jurisdictional issues after removal does not conflict with this Court's decisions cited by Petitioners. Rather, the Circuit Court's position is in accord with the well-established rule that federal jurisdiction will be judged on the basis of the record in the state court at the time the removal petition is filed.

Finally, despite the Petitioner's protestations, this petition is not about CAFA. Neither of the issues raised have any roots in CAFA nor turn on the provisions of CAFA. The reference to CAFA in the third section of the petition is merely a feeble attempt to inject importance into ill-conceived issues where there is none. If the Petitioners were concerned with CAFA, their petition would include the several CAFA issues of interpretation decided by the lower courts.

This case could have been removed to any of the federal circuits which have adopted a burden of proof for the removing defendant to establish diversity jurisdiction and the result should have been the same. The same rules and procedures would have been applied in any of those circuits. Contrary to the petition, the result would not be governed by the happenstance of venue.

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and as "proof to reasonable probability," appear to be "largely identical" variations. *Nollet v. Palmer,* ___ F. Supp. 2d ___, 2002 U.S. Dist, LEXIS 13564, * 7 n. 3.

CONCLUSION

Petitioners have not established any compelling reason for this Court to grant the petition. Respondents respectfully request that the petition be denied.

Respectfully submitted,

LLOYD W. GATHINGS II
HONORA M. GATHINGS
Counsel of Record
GATHINGS LAW
2100 Third Avenue N., Ste. 900
Birmingham, AL 35203
(205) 322-1201
Attorneys for Respondent

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